

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: April 25, 2003

TO : Rochelle Kentov, Regional Director  
Margaret Diaz, Regional Attorney  
Karen K. LaMartin, Assistant to the Regional Director  
Region 12

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Laborers (Pavarini Construction Co.)  
Case 12-CC-1262 560-2550-8333  
560-2575-6746

This case was submitted for advice as to whether the Union violated Section 8(b)(4)(i) and (ii)(B) of the Act when 40 to 50 Union agents demonstrated at a neutral employer's facility, carried signs denouncing the neutral employer, engaged in confrontational handbills, chanted slogans, confronted customers and neutral employees, and stationed persons dressed in rat suits at the entrances to the neutral employer's building.

We conclude that the Union picketed and engaged in other confrontational conduct to induce and encourage employees to engage in work stoppages, and to coerce neutral employers to cease doing business with the primary employer. Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(4)(i) and (ii)(B).

### FACTS

Jade Brickell Bay Associates Ltd. ("JBBA") is a joint venture between Fortune International Realty, Inc. ("Fortune"), and Swire Pacific Holdings, Inc. (Swire); each owns 50% of JBBA. JBBA is developing and marketing for sale Jade Residences at Brickell Bay, which are luxury condominiums under construction in Miami, Florida.

About March 2003,<sup>1</sup> JBBA hired Pavarini Construction, Inc. (Pavarini) as the general contractor for the Jade Residences construction project. Some Pavarini employees work at the construction site, but Pavarini has subcontracted much of the construction-related labor, including forming work to G&E Construction (G&E). The Union does not represent any employees on the Jade Residences project.

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<sup>1</sup> All dates are in 2003, unless noted otherwise.

Fortune's office building is about two blocks from the Jade Residences construction site. The Jade Residences sales center is located inside Fortune's office building, and several signs outside of the building promote the Jade Residences. In addition to conducting Jade-related business, Fortune uses its building to perform general real estate work and sell other south Florida condominiums it is developing. Pavarini does not perform any construction work at Fortune's office building.

For approximately two years, the Union has sponsored a group of union employees and volunteers that visits south Florida and attempts to educate the public regarding employers' alleged exploitation of workers. In its campaign, the Union addresses the employees' low wages, lack of health insurance, and unsafe working conditions. The Union's current campaign may continue through July; as part of its campaign, the Union has conducted demonstrations at several south Florida locations.

On March 10, at approximately 1 p.m., about 40-50 Union agents wearing orange Union T-shirts began demonstrating at Fortune's office building. As many as four protesters took turns wearing a red rat suit and a gray rat suit in front of Fortune's building during the demonstration.

Soon after the protesters arrived, they blocked three entrances and exits to Fortune's office building. Fortune employees and prospective customers attempting to enter or exit Fortune's parking area were forced to stop until protesters moved aside.

The Union protesters handbilled in front of Fortune's office building and Fortune's parking area, approaching and handbilling drivers, some of whom were Fortune employees. The Union's handbills condemned Pavarini's owner for corrupt behavior; noted Pavarini and G&E's OSHA violations, and fines assessed to each; and summarized a jury award against G&E in a wrongful death suit. The Union handbills further asserted that "Jade Condominiums are using unsafe contractors" and that Fortune is contributing to the exploitation of workers by using Pavarini and G&E.

Many protesters carried 3' X 3' poster board signs. The signs stated in English and Spanish, "No Jade;" "Fortune, Say No to the Jade;" "Honk your Horn, Say No to the Jade;" "Is Jade Safe?;" "Jade is Unsafe; and "Pavarini Exploits Workers". Protesters also chanted, in English and Spanish, "No Pavarini;" "No Jade;" "Pavarini Exploits Workers;" "Fortune is Unfair;" "Jade is Unsafe;" "Ole Ole Down with Jade;" and "Laborers' -- everywhere we go, people want to know where we are." The demonstration apparently

grew so loud that one customer inside Fortune's offices was heard to exclaim, "What the hell is going on outside?" In response to the protesters' activities and the accompanying din, Fortune canceled its sales appointments for the following day.

Throughout the afternoon, two trucks, mounted with large signs and driven by Union agents, patrolled the street in front of Fortune's office building. At one point, the trucks entered Fortune's parking lot, but left when confronted by Fortune representatives. The signs on the trucks had a large amount of text in English and Spanish, criticizing working conditions created by a non-union subcontractor working on another Pavarini-run project.

At one point, Fortune's project manager walked through the crowd to document the demonstration. As he did so, two or three unidentified protesters shouted at him through cardboard cones, "We know where you live!" Other protesters with signs blocked the project manager's path, forcing him to step off the sidewalk to avoid them.

Also during the demonstration, Fortune's vice president of construction contacted someone he thought was the main organizer and asked what the protesters' concerns were. The protester told the vice president to read the handbill. The Fortune official did so and asked how Fortune was involved; the protester did not respond.

Later that day, the Fortune vice president again contacted the apparent protest leader. The protester stated that the group was from the Union and would be in Miami for four months to protest substandard wages paid by general and formwork contractors, and to inform the public about "what was going on in Miami." An unidentified protester stated during the exchange that Miami contractors paid the lowest wages in the country. The Fortune official expressed sympathy and commented that he had no control over contractors' employment practices.

At around 2:00 p.m., police arrived to address the demonstration. Police officers instructed the protesters to avoid blocking Fortune's entrances and exits; using bullhorns, whistling, making loud noises; and impeding traffic. Subsequently, the noise level dropped considerably and protesters stopped blocking Fortune's entrances and exits.

Shortly after the police departed, the protesters left the Fortune building for the Jade Residences construction site, ostensibly to speak with workers there about working conditions on the project. Protesters at the jobsite stood

on the public street directly in front of a chain link fence chanting, "How could you treat your workers this way?" The protesters did not have signs or handbills. An unidentified protester approached the jobsite superintendent and asked whether he felt bad about the wages of Florida workers; the superintendent stated that the Florida market dictated wages.

After about an hour at the construction site, the protesters returned to Fortune's office building where they again chanted, carried signs, and blocked Fortune's entrances and exits. About 15 minutes later, the demonstration ended and the protesters left the area.

The Union has engaged in similar activities in front of another Pavarini luxury condominium construction site in south Florida and in front of Florida International University, where Pavarini is performing some construction work. There is no evidence that the Union has engaged in similar conduct at Fortune's office building since March 10.

#### **ACTION**

We conclude that the Union picketed at Fortune's office building, and demonstrated at the Jade Residences site, for the purpose of inducing or encouraging work stoppages, in violation of Section 8(b)(4)(i)(B); and picketed at Fortune's office building to coerce neutral employers to cease doing business with Pavarini, in violation of Section 8(b)(4)(ii)(B). We further conclude that regardless of whether the Union technically engaged in picketing, the totality of the Union's conduct here was so confrontational that it was tantamount to picketing. Thus, the Region should issue complaint, absent settlement.

"Section 8(b)(4) proscribes picketing and "all [union] conduct . . . inten[ded] to coerce, threaten, or restrain third parties to cease doing business with a neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective."<sup>2</sup> Union picketing usually involves individuals patrolling while carrying placards; whether the placards

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<sup>2</sup> Teamsters Local 122 (August A. Busch & Co.), 334 NLRB No. 137, slip op. at 15 (2001) (citations omitted), enfd. 2003 WL 880990 (D.C. Cir. 2003). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (citations omitted).

are attached to sticks is immaterial.<sup>3</sup> The Board has long held, however, that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.<sup>4</sup> On the other hand, "[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."<sup>5</sup> Along the same lines, "[t]he important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."<sup>6</sup>

Picketing involves a "mixture of conduct and communication," and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'"<sup>7</sup> The Board has also recognized

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<sup>3</sup> See Painters District Council 9 (We're Associates), 329 NLRB 140, 142 (1999) (individuals carrying picket signs "without sticks" was picketing); Brewery Workers Local 366 (Adolph Coors Co.), 121 NLRB 271, 282 (1958) (picketing consisted not of signs with sticks, but placards fashioned into sandwich boards). See also, Trinity Maintenance, above, 312 NLRB at 750 (demonstrators never carried conventional placards, but carrying message bearing flags at the entrances to two buildings "clearly constituted picketing").

<sup>4</sup> See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

<sup>5</sup> Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

<sup>6</sup> Stoltze Land & Lumber Co., above, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

<sup>7</sup> See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

that the "conduct element" in picketing invokes a response regardless of any message.<sup>8</sup>

In determining whether employees are engaged in protected DeBartolo handbilling or proscribed picketing, the Board looks to whether, under the totality of the circumstances, a union is using conduct rather than speech to induce a sympathetic response. For example, because of its confrontational and coercive nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing,<sup>9</sup> as may patrolling with signs, including a sign-mounted truck.<sup>10</sup> Confronting customers and employees as they enter a neutral employer's facility will also constitute unlawful picketing if it is sufficiently coercive.<sup>11</sup> The Board has even found that signs placed in

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<sup>8</sup> See, e.g., Iron Workers Local 386 (Warshawsky & Co.), 325 NLRB 748, 753 (1998) enf. denied sub nom Warshawsky & Co. v. NLRB, 182 F.3d 948 (D.C. Cir. 1999), cert. denied 529 U.S. 1003 (2000), citing Bakery & Pastry Drivers & Helpers, Local 801 v. Wohl, 315 U.S. 769 (1942); Laborers Local 332 (C.D.G., Inc.), 305 NLRB 298, 305 (1991), citing Hughes v. Superior Court of California, 339 U.S. 460 (1950).

<sup>9</sup> See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)"); Truax-Traer Coal Co., above, 177 NLRB at 218 (finding picketing where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

<sup>10</sup> See We're Associates, 329 NLRB at 142 (sign mounted on automobile equated with picketing); Electrical Workers IBEW Local 98 (Telephone Man), 327 NLRB 593, 600 (1999) (union violated 8(b)(4)(i) and (ii)(B) by patrolling from primary gate to secondary gate in an attempt to pressure secondary employers at the worksite).

<sup>11</sup> See, e.g., We're Associates, above, 329 NLRB at 142 (union's conduct of milling about and confronting neutral employees' vehicles at entrance to facility was picketing, not a "demonstration," and therefore unlawful under Section

proximity to the entrance may constitute picketing under certain circumstances.<sup>12</sup>

Here, the Union unlawfully picketed at Fortune's office building when its 40 to 50 agents carried large signs and patrolled in front of Fortune's office building and at the building's entrances and exits.<sup>13</sup> The evidence also establishes that the Union picketed for a secondary object of coercing Fortune and JBBA to cease doing business with Pavarini. The Union's non-handbilling conduct at Fortune's office building, and the Union's language on its signs and when chanting all targeted Fortune and JBBA, rather than Pavarini. Because the Union sought to achieve these secondary objectives using proscribed means, i.e., picketing, the Union violated Section 8(b)(4)(ii)(B).<sup>14</sup>

Even if the Union's carrying of placards did not technically constitute picketing, we conclude that the totality of the Union's confrontational conduct would constitute picketing at the Fortune building. That conduct was not pure speech as defined in DeBartolo II, but the

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8(b)(4)(i)(B)); William J. Burns Intl. Detective Agency, Inc., above, 136 NLRB at 437 (handbillers impeded customer access to neutral employer's premises in a manner that also included element of physical restraint). See also, Construction & General Laborers Local Union 4 (Quality Restorations), Case 13-CC-2006, Advice Memorandum dated January 19, 1996 (purpose of individual dressed as a rat who patrolled in front of association was to confront customers or employees rather than to engage in protected free speech).

<sup>12</sup> See, e.g., Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (finding picketing in 8(b)(7)(B) case where the union stuck two picket signs, which were monitored by union agents from a nearby car, in a snowbank in front of the employer's facility after the union had engaged in three months of traditional picketing at the facility); see also Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987) (union signs were placed at or near one or more of the entrances to common situs so that they could be read by anyone approaching them); Construction & General Laborers Local 304 (Athejen Corp.), 260 NLRB 1311, 1319 (1982) (union placed signs on safety cones, barricades, and on jobsite fence).

<sup>13</sup> See, e.g., We're Associates, above, 329 NLRB at 142.

<sup>14</sup> See, e.g., Telephone Man, above, 327 NLRB at 600.

kind of "mixture of conduct and communication" intended to "provide[] the most persuasive deterrent to third persons about to enter a business establishment."<sup>15</sup> Indeed, the totality of circumstances presented here - 40 to 50 Union agents massing at the entrances and exits to Fortune's building; Union agents carrying placards denouncing Jade and Fortune; Union agents chanting and using bullhorns, cardboard cones, and whistling to confront traffic in front of Fortune's building, Fortune customers, and Fortune employees; Union agents patrolling the area using sign-mounted pick-up trucks; and Union agents wearing rat costumes and stationing themselves at the entrances to the Fortune building - all establish that the Union was attempting to use conduct, rather than speech, to induce a sympathetic response, thus violating Section 8(b) (4) (ii) (B).<sup>16</sup>

The evidence also establishes that the Union's conduct at Fortune's office building (and, therefore, at JBBA's offices), and at the Jade Residences construction site, generally was intended to induce or encourage employees of Fortune, Pavarini, and other contractors working on the Jade Residences project to strike or otherwise refuse to perform services. Union agents had direct, intentional contact with Fortune employees, at times shouting them down and making veiled threats against such Fortune employees as the vice president of construction and the project manager. In these circumstances, we conclude that the Union's conduct violated Section 8(b) (4) (i) (B).<sup>17</sup>

In sum, the Region should issue complaint, absent settlement, alleging that the Union engaged in actual picketing at Fortune's office building and that the Union's

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<sup>15</sup> DeBartolo, above, 485 U.S. at 580, quoting Safeco, above, 447 U.S. at 619.

<sup>16</sup> See, e.g., Kansas Color Press, above, 169 NLRB at 283, citing Stoltze Land & Lumber Co., above, 156 NLRB at 394 (1965). See also Trinity Maintenance, above, 312 NLRB at 743. Because the Union's conduct as a whole constitutes picketing, it is unnecessary to address whether Union demonstrators dressed in rat suits constitutes "signal picketing."

<sup>17</sup> The words "induce or encourage" are broad enough to include every form of influence and persuasion. Electrical Workers IBEW Local 501 (Samuel Langer) v. NLRB, 341 U.S. 694, 701-02 (1951). See, e.g., Service Employees Local 525 (General Maintenance Co.), 329 NLRB 638, 680 (1999) (by targeting tenants and other neutrals, union sought to induce or encourage employees to withhold their services).



conduct as a whole was tantamount to unlawful picketing. The Region should further allege that the Union's conduct was intended to induce and encourage employees to withhold their services, and to coerce Fortune to cease doing business with Pavarini. [FOIA Exemption 5

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B.J.K